Filed 1/7/14 In re C.D. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re C.D. et al., Persons Coming Under the Juvenile Court Law. | |
| SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>B.D.,<br><br>Defendant and Appellant. | E059038<br><br>(Super.Ct.Nos. J249144, J249145)<br><br>**OPINION** |

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Dawn M. Messer, Deputy County Counsel, and Jean-Rene Basle, County Counsel, for Plaintiff and Respondent.

The juvenile court declared seven siblings dependants and removed them from their mother's custody. B.D. (father) is the father of two of the siblings — J.D., a girl now aged seven, and C.D., a girl now aged four (collectively children). At the time, the father was incarcerated; to the best of our knowledge, he remains incarcerated to this day.

In this appeal, the father contends:

1. The juvenile court failed to make adequate findings with regard to whether it would be detrimental to place the children with the father.

2. The juvenile court erred by refusing to order reunification services for the father.

We find no error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

E.M. (mother) has at least seven children. Appellant B.D. is the presumed father of two of those children — J.D. and C.D.

In April 2013, the mother took her youngest child (not a party to this appeal) to the hospital. He had bumps on his head and several bite marks. She claimed that the injuries occurred while he was in the care of her mother (the maternal grandmother). However, "the mother's story of the injuries and who cares for her children ke[pt] changing." The mother admitted a past history of methamphetamine abuse. At the time, the father was in prison.

Based on these facts, Children and Family Services (Department) detained all seven children and filed juvenile dependency petitions concerning them.

Later, one child reported that the mother suspected the father of molesting C.D. and another child. The mother denied this. However she did say "the children should not be around people like [the father]." In a forensic interview, that same child reported that the father spanked the children with a belt and hit the mother in the face.

The Department determined that the father had a criminal history going back to 1997, including convictions for possession of a prohibited weapon (former Pen. Code, § 12020, subd. (a)), making criminal threats (Pen. Code, § 422), disturbing the peace (Pen. Code, § 415), spousal battery (Pen. Code, § 273.5, subd. (a)), active gang participation (Pen. Code, § 186.22, subd. (a)), and four convictions for possession of a controlled substance (Pen. Code, § 11377, subd. (a)).

In June 2013, at the jurisdictional/dispositional hearing, the juvenile court sustained the allegations of the petitions. Specifically with regard to J.D. and C.D., it found that it had jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)), in that:

1. The mother had left the children in the care of the maternal grandmother;
2. The mother lacked knowledge and parenting skills;
3. The mother had a history of substance abuse;
4. The father had a criminal history, including misdemeanor spousal abuse;
5. The father had a history of substance abuse; and

6. The father knew or reasonably should have known that the children would be at risk if left in the mother's care.

It further found that it had jurisdiction based on failure to support (Welf. & Inst. Code, § 300, subd. (g)), in that the father was incarcerated.

Finally, it also found that it had jurisdiction based on abuse of a sibling (Welf. & Inst. Code, § 300, subd. (j)).

It formally removed the children from both parents' custody and placed them with the Department.

Counsel for the father requested reunification services. The juvenile court denied the request, finding that he was incarcerated and that reunification services would be detrimental to the children. (Welf. & Inst. Code, § 361.5, subd. (e).)

II

THE FINDING THAT PLACEMENT WOULD BE DETRIMENTAL

The father contends that the juvenile court erred by finding that placement with him would be detrimental.

Welfare and Institutions Code section 361.2, subdivision (a) provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court

shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

Welfare and Institutions Code section 361.2, subdivision (c) provides: "The court shall make a finding either in writing or on the record of the basis for its determination under subdivision[] (a) . . . ."

Here, the juvenile court found that "[p]lacement with noncustodial parent is detrimental to the safety and protection."

Preliminarily, the father argues that the juvenile court erred by finding that placement with the "noncustodial parent" would be detrimental when there were multiple noncustodial fathers of the mother's seven children. He asks us to conclude that "the court flat out failed to apply section 361.2 to [him]." The father, however, did not qualify for placement under Welfare and Institutions Code section 361.2. In *In re A.A.* (2012) 203 Cal.App.4th 597 [Fourth Dist., Div. Two], this court held that a "parent must be *both* nonoffending *and* noncustodial . . . in order to be entitled for consideration under section 361.2 . . . ." (*Id.* at p. 608.) Here, the father was "offending," in the sense that the juvenile court found that it had jurisdiction over the children based on the father's history of substance abuse, his criminal history, his incarceration, and his leaving the children in the mother's care. (See *id.* at p. 606.) Thus, the juvenile court was not required to make any finding regarding placement with him.

Separately and alternatively, even assuming the juvenile court was required to make such a finding, the father cannot show that it failed to do so. As he acknowledges

at least in passing, "[a] '"'judgment or order of the lower court is *presumed correct*[, and a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" [Citation.]' . . ."' [Citation.]" (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499.) Here, it is not only reasonably inferable but affirmatively obvious that the juvenile court meant that, *as relevant to each child*, placement with *that child*'s noncustodial parent would be detrimental.

More substantively, the father also argues that the juvenile court failed to "make a finding . . . of the basis for its determination" under Welfare and Institutions Code section 361.2, subdivision (c). Once again, under *In re A.A.*, *supra*, 203 Cal.App.4th 597, it was not required to do so.

Separately and alternatively, however, we also note that the asserted error was clearly harmless. A failure to make the findings required by Welfare and Institutions Code section 361.2, subdivision (c) is harmless when there is no reasonable probability that, if the juvenile court had made such findings, it would have come to a different conclusion on the ultimate issue. (*In re J.S.* (2011) 196 Cal.App.4th 1069, 1078-1079.)

"In making a finding of detriment, the court may consider any jurisdictional findings that may relate to the noncustodial parent under [Welfare and Institutions Code] section 300, as well as any other evidence showing there would be a protective risk to the child if placed with that parent." (*In re V.F.* (2007) 157 Cal.App.4th 962, 970.) Here, as mentioned, the juvenile court had already made jurisdictional findings of failure to protect, based on the father's history of substance abuse, criminal history, and leaving the

child in the mother's care. Moreover, it had made a jurisdictional finding of failure to support, based on the father's incarceration. This was ample evidence of detriment. And there was no evidence of absence of detriment. A finding of detriment was virtually inevitable.

Indeed, the father's incarceration alone made it pretty much inconceivable that the children could be placed with him. He argues that perhaps he could have arranged for a third party to care for the children. However, by finding jurisdiction based on failure to support, the juvenile court had necessarily already found not only that the father was incarcerated, but also that he could not "arrange for the care of the child . . . ." (Welf. & Inst. Code, § 300, subd. (g).)

At the hearing, the father's counsel did state, "[H]e has two relatives he wishes to be assessed for placement if the need . . . comes up." However, what the father's counsel was requesting was relative placement under Welfare and Institutions Code section 361.3, in which the Department would have custody and would be ultimately responsible for the children's care. By contrast, placement of the children in the father's custody under Welfare and Institutions Code section 361.2 would mean that he would be ultimately responsible (financially and otherwise) for their care, even if he chose to delegate the actual provision of that care to a relative. The father's counsel never indicated that the father was in a position to take custody and to arrange for the care of the children.

In sum, no finding on the issue was even necessary; but if it was, on this record, the only rational finding was that placement of the children with the father would be detrimental.

III

THE DENIAL OF REUNIFICATION SERVICES

The father contends that the juvenile court erred by denying him reunification services.

Welfare and Institutions Code section 361.5, subdivision (e), as relevant here, provides: "If the parent or guardian is incarcerated, . . . the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider [1] the age of the child, [2] the degree of parent-child bonding, [3] the length of the sentence, . . . [4] the nature of the crime . . . , [5] the degree of detriment to the child if services are not offered . . . , [6] the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations . . . , and [7] any other appropriate factors."

The father argues that the juvenile court failed to consider each and every one of the statutory factors. However, "[u]nder the doctrine of 'implied findings,' if the record is silent, we must presume the trial court fully discharged its duty to consider all of the relevant statutory factors . . . . [Citations.]" (*Brewer v. Carter* (2013) 218 Cal.App.4th 1312, 1320; see also *In re Steven A.* (1993) 15 Cal.App.4th 754, 765 [Fourth Dist., Div. Two] [where juvenile court did not discuss on the record the factors under Welf. & Inst.

Code, § 361.5, subd. (e) that favored reunification, "the presumption is that such factors were deemed unpersuasive"].)

The father asserts that the juvenile court could not have considered the degree of parent-child bonding, the degree of detriment to the child if services are not offered, or any "other . . . factors," because "the record is silent on" them. If he means that the juvenile court did not discuss them on the record, that is not required. If he means that there was no evidence regarding them, that fact alone means that the juvenile court was not required to consider them. For example, it would be absurd to require the juvenile court to consider "other appropriate factors" when there was no evidence that there were any other relevant factors. "[Welfare and Institutions Code s]ection 361.5 subdivision (e)(1) does not require that each listed factor exist in any particular case, nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not." (*Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13, 18.) If the father wanted the juvenile court to consider bonding between him and the children, he should have introduced evidence that there was, in fact, such bonding.

Next, the father argues that the record is insufficient to support the juvenile court's detriment finding because the social worker apparently did not interview the father and did not report on the services available in prison. The father's counsel, however, was free to obtain a transportation order (see Pen. Code, § 2625, subds (d), (e)) and to call the father to testify. Likewise, he could have presented evidence regarding the services available in prison. In any event, given the juvenile court's finding that reunification

services would be detrimental, further details regarding the nature of the available services was irrelevant.

Significantly, the father does *not* contend that there was *not* substantial evidence of detriment. We therefore conclude the juvenile court properly bypassed reunification services.

IV

DISPOSITION

The order appealed from is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.